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No. 548

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

BUFFALO FAULTLESS PANTS COMPANY, INC., *Petitioner*

v.

THE UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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No.

BUFFALO FAULTLESS PANTS COMPANY, INC., *Petitioner*

v.

THE UNITED STATES, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above-entitled case on June 5, 1956.

CITATIONS TO OPINIONS BELOW

The Opinion of the United States Court of Claims, printed in Appendix B hereto, *infra,* p. 2a, and appearing in the Record at pp. 35-39, is reported in 142 F. Supp. 594.

JURISDICTION

The judgment of the United States Court of Claims was entered on June 5, 1956 (R. 35). An order extending time to file petition for writ of certiorari to and including November 3rd, 1956, was granted on September 4th, 1956 (*infra,* Appendix C, p. 7a). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1255.

QUESTION PRESENTED

Whether a Federal Trial Court may apply a standard of "negligence" other than the standard formulated by and applied in Federal decisional law, in imputing "fault or negligence" to a claimant under a federal statute.

STATUTES INVOLVED

The statutory provisions involved are the relevant sections of the Lucas Act, 60 Stat. 902, as amended, 62 Stat. 869, 992, 41 U.S.C. 106 note (Supp. II, 1946 Ed.) They are printed in Appendix A, *infra,* p. 1a.

STATEMENT

A petition was filed against the United States by the petitioner under the Lucas Act to recover a net loss attributable to contracts with the Government during World War II. It was stipulated by the parties that the net loss attributable to the two contracts involved in the litigation was $91,086.36 (R. 40).

The petitioner a successful manufacturer of men's pants since 1919, had satisfactorily performed five contracts for Army wool serge trousers prior to entering into the two contracts under which the stipulated net loss was sustained (R. 40). These two contracts in

suit were for British Army cotton shorts under Lend-Lease which had never previously been made in the United States (R. 50). The United States War Department solicited these two contracts from the petitioner and the petitioner made its offer subject to receiving preference rating certificates "to enable it to purchase certain specific items of machinery". (Exhibits 1 and 2; R. 41).

A total of twenty-nine similar contracts were awarded at comparable prices under circumstances outlined in a War Department Memorandum dated June 24, 1943 which is set forth by the Court below as its Findings of Fact Nos. 15 and 35, reading, in part, as follows:

> "1. As a result of subject directive a total of 29 contracts were awarded in the procurement of 2,180,000 Trousers, Cotton, Khaki, Knee Length, War Aid.
>
> 2. Out of the 29 contracts awarded under subject directive, a total of 21 are delinquent as of this date. This delinquency is due to:
>
> a. At the time awards were made, this Depot was procuring large quantities of Jackets, Herringbone Twill, Special; Shirts, Cotton, Khaki, Special; and Suits, One-Piece, Herringbone Twill, Special, therefore awards were made with many firms which would not normally have been given contracts because they lacked sufficient equipment and experience on this type of item.
>
> b. This item is one which has never been previously made by any contractor. Several specification requirements have made this item particularly difficult to manufacture on a mass production basis.
>
> c. Labor shortages have played havoc with the normal flow of production in almost every

instance. It was necessary to place five contracts in Buffalo, N. Y.—one of the nation's most serious labor shortage areas.

d. Being a new item, many bidders figured their manufacturing costs too low."

After hearings before a Commissioner for the Court below, the Commissioner made a report, including as his Finding of Fact No. 40 a finding to the effect that the stipulated loss "was due *in part* to the fault of the plaintiff" (R. 34). (Emphasis supplied). In his other Findings the Commissioner made it clear that Finding of Fact No. 40 was premised upon a "lack of adequate supervision". (R. 28). Coupled with this Finding of Fact No. 40 was Finding of Fact No. 16 stating that the place of manufacture of petitioner was an area of serious labor shortage and Finding of Fact No. 30 (third paragraph) to the effect that the plant superintendent "was entirely competent", but did not have adequate assistance. (R. 24, 28). The Court below made Findings of Fact identical with those referred to heretofore, except that the Court's Finding of Fact No. 40 was revised to read that the stipulated losses "were at least in substantial part due to the fault of the plaintiff", as compared to the Finding of the Commissioner that the stipulated loss "was due in part to the fault of the plaintiff". (R. 34, 52).

The Court below dismissed the petition of the plaintiff, the petitioner herein, upon the grounds that the petitioner undertook to deliver under contracts requiring expansion of production, machinery, and labor, and since the stipulated loss was largely attributable to petitioner's deficiencies in coping with the managerial problems which such an expansion raised,

petitioner's loss had to be imputed to its negligence and petitioner's recovery was barred. The Court below stated that in making its decision upon these grounds it recognized that *"Perhaps anyone was bound to fail in these circumstances"*. (Emphasis supplied) (R. 39). The Court below however did *not* in its Opinion *or* Findings of Fact impute negligence to the petitioner on the grounds that the facts or circumstances which caused the stipulated loss were due to any acts or omissions by the petitioner in the performance of the two contracts, of which a reasonable, prudent contractor under similar circumstances would *not* have been guilty. (R. 35-53).

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below in the instant case is in direct conflict with the Federal decisional law as promulgated by the Federal District and Circuit Courts and by this Honorable Court.

There are very few so well settled and fundamental legal concepts as that of negligence. Despite the converse proposition that there is probably no issue so difficult to determine as that involving the application of the legal concept of negligence to a particular set of facts, the concept seems universally as stated by this Honorable Court in the case of *Schutz* v. *Pennsylvania Railroad Company*, 350 U.S. 523, 525; 76 S. Ct. 608, 610 (1956), to wit:

> "Usually one discussing the subject will say that negligence consists of doing that which a person of reasonable prudence would not have done, or of failing to do that which a person of reasonable prudence would have done under like circumstances".

The foregoing definition is an unchallenged distillation of the Federal decisional law on this subject. As such, in this case the Court below was obligated to apply it in connection with the Federal statute involved.

As this Honorable Court pronounced in the case of *Urie* v. *Thompson,* 337 U.S. 163, 174; 69 S. Ct. 1018, 1027 (1949), involving another Federal statute:

> "Federal decisional law formulating and applying the concept [of negligence] governs".

The decision of the Court below bars recovery on the ground of imputed "fault or negligence". In its own decisions under the Lucas Act the Court of Claims has recognized that "fault or negligence" means nothing more than "negligence" as the word is usually employed. In the case of *Howard Industries, Inc.* v. *United States,* 126 Ct. Cl. 283, 293; 115 F. Supp. 481, 488 (1953), the lower Court referred to ". . . the statutory requirement that only those plaintiffs may recover whose losses were not due to their negligence . . ."

In the instant case the decision of the Court below does not define the concept of negligence which it applies. The Court says in its Opinion that "perhaps, *anyone* was bound to fail in these circumstances". This statement taken in conjunction with the rest of the Opinion clearly demonstrates the application of a legal concept of negligence which involves not the standard of the *reasonable* man but that of a *perfect* man—in other words, any mistake or error regardless of circumstances is negligence. This concept is especially abhorrent in the instant case where

a statute which was designed to give relief and equity was involved.

2. The decision of the Court below in the instant case is of importance in the administration of all Federal laws providing for relief of claimants, and the entire body of Federal law wherein the concept of negligence may require interpretation and application.

The legal concept of negligence is important to the administration of a substantial proportion of the Federal laws. As pointed out above, the Federal decisional law, which must be applied, yields a uniform legal concept approved by this Honorable Court. It is incumbent upon the Court of Claims to apply this legal concept wherever the Congress makes the concept of negligence important in its legislation. Not only should the Federal decisional law be applied, but it should be applied forthrightly. If this is not done there may well be a subtle erosion of the legal principle involved. If the Court below has not directly invoked a new concept of negligence in the instant case, it certainly has failed to apply clear-cut legal principles. The Court below, in its Opinion, recites at considerable length some of the difficulties encountered by the petitioner in the performance of two contracts, as a result of which a loss was suffered. Then it proceeds to say that despite the fact that "perhaps anyone was bound to fail in these circumstances", the pre-existing *difficulties* themselves, not anything petitioners did or failed to do (difficulties which both parties knew existed and were beyond the petitioners' or anybody else's power to overcome) permit the Court to impute "negligence" to the *petitioner*. As was said by the Court of Appeals for the Tenth Circuit in

Schmidt v. *United States*, 179 F. 2d 724, 726 (1950), (quoting in part Mr. Justice Cardozo),

> "In every instance, before negligence can be predicated of a given act, back of the act must be sought and found a duty to the individual complaining, the observance of which would have averted or avoided the injury.
>
> "This is just another way of saying that the invasion of one's right must be the direct, proximate, or efficient cause of the injury."

The Court below not only applied a new concept of negligence but in fact violated the basic principle of law that something that petitioner did or failed to do had to be "the direct, proximate, or efficient cause" of the loss before the Court could find petitioner was barred from recovery. It is submitted that there is no Federal decisional law which supports such a concept. *It is significant that the Court below provides no citation to support its unique position.*

It has been found by this Honorable Court that an issue of this kind may assume importance because the lower Court's decision is at war with a well-established construction given a statute by the administrative agents charged with its enforcement. *Patterson* v. *Lamb*, 329 U.S. 539, 67 S. Ct. 448 (1947). The concept of negligence established by the common law and adopted by the Federal decisional law is so uniform that the administrative agents charged with the enforcement of statutes in which the concept of negligence is a factor, apparently apply that concept without deviation. For example: in an administrative determination under the very statute involved herein, the War Contract Hardship Claims Board of the Department of the Army in the *Claim of Hanover Woolen*

Mills Company, under Public Law 657, HCB No. 45 (1949), was confronted with a situation in which the Board determined at p. 12 that:

> ". . . On the question of possible negligence, the evidence presented before the Board discloses that claimant sustained the major part of its loss because it undertook to produce 32-ounce cloth at a unit price determined by mills equipped to produce such cloth when its own equipment, which was admittedly not of the best, was capable of producing efficiently only 20-ounce cloth or cloth of a lesser weight. There is nothing in the record to show that within the limitations imposed by its lack of modern equipment claimant's mill was not efficiently operated or that inefficient manufacturing methods were employed in producing the cloth required by its contract. Hence, claimant could have avoided its loss only by refusing to accept the contract at the agreed unit price."

The Board then proceeded to apply the concept of negligence required by the Federal decisional law and found at pp. 12 and 13 as follows:

> "In the opinion of the Board, claimant's acceptance of this contract with knowledge that at the agreed unit price it would probably sustain a loss does not of itself constitute fault or negligence on its part. This Board has previously held that to impute 'fault or negligence' to a contractor within the meaning of the Act and the executive order it must be found that the facts or circumstances which caused the loss were due to acts or failures of contractor in the performance of a contract, of which a reasonable prudent contractor under similar circumstances would not have been guilty. Hence, this Board finds that subject claim is equitable under all the circumstances and that the loss was incurred without fault or negligence on the part of the claimant".

In the foregoing administrative action, it is clear that in an almost identical situation the administrative agents charged with the enforcement of this statute employ the well-established construction of the concept of negligence applied when the concept of negligence is made an important factor in a statute by the Congress. A comparison of the statement of facts as found by the Board with the Findings of Fact Nos. 15 and 35 in the instant case as found by the Court below, shows an unusual identify of factual situations. In the instant case there was also a comparable price applied to all twenty-nine contracts for identical work awarded through the United States, regardless of extraneous factors as availability of equipment, supervision and labor.

The concept of "negligence" requires such frequent interpretation under Federal statutes that any deviation from the Federal decisional law may well be a serious hindrance to effective administration of laws involving the concept of negligence because of the confusion which might be created on the administrative level.

3. The decision of the Court below in the instant case is unjust, unreasonable and plainly wrong. Since the Court of Claims is the sole forum in which many claims made under applicable statutes similar to the Lucas Act can be brought, and since it is reasonable to believe that the issue is one of continuing importance under successive acts in which the concept of negligence is a factor, the issue arising in this litgation has a unique importance warranting review.

The legislative history of the Lucas Act is recited in *Fogarty* v. *United States*, 340 U.S. 8, 71 S. Ct. 5

(1950). It is clear that this Act was passed to grant generous relief and it was the intention of Congress that the Act be liberally construed.

The "fault and negligence" standard was inserted only upon protestation from the General Accounting Office, that unless *some* standards were written into the Act, ". . . the relief . . . necessary to prevent a manifest injustice, is so broad and susceptible of so many different interpretations, varying all the way from law through equity down to natural justice . . ." (*War Contract Hardship Claims,* Sub-Committee, Judiciary Committee of the Senate on S. 1477. 79th Cong. 2d Sess. April 12 and 13, 1946).

Under such circumstances, the decision of the lower Court in the instant case, which to all practical purposes makes the petitioner the "insurer" of its performance, is not only contrary to the Federal decisional law, but effectively disregards the express intent of the Legislature.

This petitioner has no other recourse than to this Honorable Court. This petitioner is clearly entitled to relief if upon application of the uniform legal principles applicable, the petitioner can sustain its case. Instead, it is submitted, the Court below has deprived this petitioner of this opportunity by either applying an incorrect standard of negligence, or by making an "ad hoc" decision without any application *at all,* of the legal principle involved.

Since the concept of negligence is a legal concept, which is so frequently employed under the Federal laws, the importance of a review of this decision, not only to this litigant but to future litigants under other Federal laws, seems apparent.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 3, 1956.

APPENDIX A

Lucas Act, 60 Stat. 902, as amended, 62 Stat. 869, 992, 41 U.S.C. 106 note (Supp. II, 1946 Ed.), (Relevant provisions).

Where works, supplies, or services have been furnished between September 16, 1940, and August 14, 1945, under a contract or subcontract, for any department or agency of the Government which prior to the latter date was authorized to enter into contracts and amendments or modifications of contracts under section 201 of the First War Powers Act, 1941 (50 U.S.C., Supp. IV, app. sec. 611), such departments and agencies are hereby authorized, in accordance with regulations to be prescribed by the President within sixty days after the date of approval of this Act, to consider, adjust, and settle equitable claims of contractors, including subcontractors and materialmen performing work or furnishing supplies or services to the contractors or another subcontractor, for losses (not including diminution of anticipated profits) incurred between September 16, 1940, and August 14, 1945, without fault or negligence on their part in the performance of such contract or subcontracts.

* * * * *

Sec. 6. Whenever any claimant under this Act is dissatisfied with the action of a department or agency of the Government in either granting or denying his claim, such claimant shall have the right within six months to file a petition with the Court of Claims * * * asking a determination by the court of the equities involved in such claim; and upon the filing of such a petition, the court sitting as a court of equity, shall have jurisdiction to determine the amount, if any, to which such claimant and petitioner may be equitably entitled * * *.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 49161

(Decided June 5, 1956)

BUFFALO FAULTLESS PANTS CO., INC., A Corporation,

v.

THE UNITED STATES

Mr. Bert B. Rand for the plaintiff. Mr. Hans A. Nathan was on the briefs.

Mr. Martin E. Rendelman, with whom was *Mr. Assistant Attorney General George Cochran Doub,* for the defendant.

OPINION

JONES, *Chief Judge,* delivered the opinion of the court:

Plaintiff brings this action under the Lucas Act, 60 Stat. 902, as amended, 62 Stat. 869, 992, 41 U.S.C. 106 note (Supp. II, 1946 Ed.), to recover for losses it sustained in the performance of certain war contracts. The relevant sections of the statute read as follows:

> Where works, supplies, or services have been furnished between September 16, 1940, and August 14, 1945, under a contract or subcontract, for any department or agency of the Government which prior to the latter date was authorized to enter into contracts and amendments or modifications of contracts under section 201 of the First War Powers Act, 1941, (50 U.S.C., Supp. IV, app., sec. 611), such departments and agencies are hereby authorized, in accordance with regulations to be prescribed by the President within sixty days after the date of approval of this Act, to consider, adjust, and settle equitable claims of contractors, including subcontractors and material-

men performing work or furnishing supplies or services to the contractor or another subcontractor, for losses (not including diminution of anticipated profits) incurred between September 16, 1940, and August 14, 1945, without fault or negligence on their part in the performance of such contract or subcontracts.

* * * * *

Sec. 6. Whenever any claimant under this Act is dissatisfied with the action of a department or agency of the Government in either granting or denying his claim, such claimant shall have the right within six months to file a petition with the Court of Claims * * * asking a determination by the court of the equities involved in such claim; and upon the filing of such a petition, the court sitting as a court of equity, shall have jurisdiction to determine the amount, if any, to which such claimant and petitioner may be equitably entitled * * *.

The parties have stipulated that the losses amounted to $91,086.36. The sole question to be determined is whether the losses were incurred without fault or negligence of the plaintiff.

Plaintiff is a New York corporation which had its principal place of business at all times material to the question at issue in Buffalo, N. Y.

Plaintiff had a number of contracts with the Government during the period September 16, 1940, to August 14, 1945. It sustained an overall loss of $94,395.48 in the performance of these contracts. The net loss attributable to the two contracts involved in this litigation was $91,086.36.

Plaintiff was a small manufacturer of trousers. By December 31, 1942, plaintiff employed only 30 to 35 persons. It had about 40 sewing machines, all of them single-needle machines. Prior to that time it had never produced more than 700 trousers per day.

On December 29, 1942, plaintiff sent a telegraphic offer to manufacture 250,000 khaki cotton trousers for Lend

Lease at 80 cents per pair. The specifications called for walking shorts with double needle seaming. The Government was to furnish the cloth, the plaintiff the other necessary materials. A formal contract was entered into on December 31, 1942.

Subsequently plaintiff made an offer to manufacture another 100,000 trousers of the same type, except with single needle seaming. A contact for this amount was dated January 20, 1943, and stipulated the price at 80 cents per pair. The delivery schedule for the contracts contemplated delivery of 341,000 trousers by June 19, 1943, with a maximum production of up to 24,000 units per week. It was evident, therefore, that to fulfill its obligations under the contracts would have required greatly expanded facilities and stepped-up methods of production on the part of the plaintiff.

In January plaintiff secured the services of Mr. Louis Stein, a production man of long experience, as its plant superintendent. About that time it was decided to change the method of production from the bundle system to what is called the straight-line system. The latter system is described as the "production line installed in the needlework industry." Plaintiff expected to expand its production by installing four such lines, by purchasing much additional machinery, and hiring many new employees.

The plaintiff made its bid with the understanding it would receive preference rating certificates to enable it to purchase certain specific items of machinery. The plaintiff did not show that it did not receive these certificates. It made considerable effort to obtain the necessary machinery but it never did secure enough of the equipment it needed to produce the contract items in sufficient numbers to maintain the production rate of 4,000 pairs of trousers per day as required by the contract. Plaintiff claims that the Government was at fault in not assuring it the necessary supply of machines, but we do not think the Government ever undertook to do so. All that the Government did was to promise the certificates, not the actual machines.

The usual method under the priorities system was to issue preference certificates which would enable the holder to purchase and use the designated critical materials wherever they might be found. It would have been wholly impracticable for the Government to undertake, under wartime conditions, to actually locate the materials for all the thousands of production contracts. It did undertake to assist essential wartime contractors by furnishing preference certificates, and by providing that without them a contractor could neither purchase nor use essential wartime materials.

Plaintiff had hired a number of operators with little or no experience in the needle trades. These persons had to be trained and closely supervised. Due to the presence of many higher-paying war industries in the Buffalo area, plaintiff had a high turnover in its personnel which created additional problems of training and supervision. This was an area of serious labor shortage both at the time the bid was submitted and during performance of the contract, and this fact was known to both plaintiff and defendant at both times. These difficulties were compounded by reason of the trousers' complicated buckle assembly, a part which could be attached properly to the garment only by a tailor of real skill.

The plaintiff's difficulties soon became evident in its production. It fell behind in deliveries and had a high rate of rejection. On March 17 Major Christie of the Philadelphia Quartermaster Depot made an investigation into the difficulties at plaintiff's plant. He observed insufficient machines and a great excess in cut garments over the amount that could then be utilized for sewing. Another representative of the defendant investigated the conditions at plaintiff's plant on May 14. He observed that the plant was greatly overcut and that of the 2 day-shift and 2 night-shift lines only 1 was operating satisfactorily. The inefficiency of the operators was due largely to lack of adequate supervision. Overcutting hampered operations by cluttering the factory and causing the cut cloth to become dirty and unraveled.

Plaintiff makes much of the fact that 29 contracts were awarded for this type of garment at the time plaintiff made its 2 contracts and that, as of June 24, 1943, 21 contracts were delinquent. But delinquent contracts other than plaintiff's were about 36 percent delinquent at that time, whereas plaintiff's contracts were over 55 percent delinquent. Nor do we think plaintiff is justified in asserting that the Government was as much at fault in awarding the contracts to plaintiff as plaintiff was in accepting them.[1] It is unquestionably true that plaintiff was operating under most difficult conditions; we cannot say, however, that plaintiff has shown that the losses which did occur were without its fault. We think, on the contrary, that deficiencies in organization and management were largely responsible for plaintiff's losses. It certainly is no fault of the Government that plaintiff had prior or concurrent commitments in its civilian business as a result of which plaintiff diverted part of its productive capacity from military to civilian work. Moreover, some of these commitments were incurred while plaintiff was experiencing the very difficulties with its military work that we have described and some of the diverted labor had undoubtedly been trained for work on the military contracts.

Plaintiff has tried to show that other contractors suffered losses on the walking shorts contracts. The evidence on this point is not very extensive. Moreover, this line of proof cannot be very persuasive unless it is fairly clear that the other contractors who form the basis of the comparison were themselves typical and were themselves without fault.

We do not think that a mere minor fault would preclude plaintiff's recovery. But that is not the instant case. Plaintiff's losses, though perhaps in some minor part attribu-

[1] At the time plaintiff submitted its first bid for the manufacture of 250,000 pairs of trousers, at 80 cents per pair, it made an alternative offer to manufacture 500,000 pairs at 85 cents. Fortunately for it, this alternative offer was not accepted. In these circumstances plaintiff can hardly justify its effort to require the defendant to share the blame for a contract which was beyond plaintiff's capacity.

table to the fact that plaintiff made its bid too law, are largely attributable to its own poor organization so that it cannot be said that plaintiff suffered losses without fault on its part.

Plaintiff undertook to deliver under a contract which required it to expand production, machinery, and labor manyfold. Perhaps anyone was bound to fail in these circumstances. But in view of plaintiff's deficiencies in coping with the managerial problems which such an expansion raises, plaintiff's failure is attributable largely to factors for which plaintiff assumed responsibility.

Plaintiff's petition will be dismissed.

It is so ordered.

LARAMORE, *Judge;* MADDEN, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge,* concur.

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No.

October Term, 1956

BUFFALO FAULTLESS PANTS CO., INC., *Petitioner*

v.

THE UNITED STATES

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 3rd, 1956.

/s/ HUGO L. BLACK
Associate Justice of the Supreme Court of the United States.

Dated this 4th day of September, 1956

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Reltool Service Co. v. *United States*, 128 C. Cls. 14 9

Rosner, Louis v. *United States*, 125 C. Cls. 614 11

Spicer, A. J. v. *United States*, 127 C. Cls. 428 11

United States v. *Brooks-Callaway Co.*, 318 U. S. 120 11

Statute:

War Contracts Hardship Claims Act (Lucas Act), 60 Stat. 902, as amended, 41 U. S. C. 106 note 2, 3, 4, 7, 8, 9, 11

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 548

BUFFALO FAULTLESS PANTS COMPANY, INC., PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 2a–7a) is reported at 142 F. Supp. 594.

JURISDICTION

The judgment of the United States Court of Claims was entered on June 5, 1956 (R. 39). By order of Mr. Justice Black, dated September 4, 1956, the time to file a petition for a writ of certiorari was extended to and including November 3, 1956 (Pet. App. 7a). The petition for a writ of certiorari was

filed on November 3, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1255.

QUESTION PRESENTED

Whether the Court of Claims properly rejected petitioner's claim under the Lucas Act, for losses sustained in the performance of certain war contracts, on the ground that the losses incurred were the consequence of petitioner's fault or negligence in the performance of those contracts.

STATUTE INVOLVED

The War Contracts Hardship Claims Act (commonly referred to as the Lucas Act), 60 Stat. 902, as amended, 41 U. S. C. 106 note, provides in pertinent part:

> Where works, supplies, or services have been furnished between September 16, 1940, and August 14, 1945, under a contract or subcontract, for any department or agency of the Government which prior to the latter date was authorized to enter into contracts and amendments or modifications of contracts under Section 201 of the First War Powers Act, 1941 (50 U. S. C. Supp. IV, App., sec. 611), such departments and agencies are hereby authorized, in accordance with regulations to be prescribed by the President within sixty days after the date of approval of this Act, to consider, adjust, and settle equitable claims of contractors, including subcontractors and materialmen performing work or furnishing supplies or services to the contractor or another subcontractor, for losses (not including dimi-

nution of anticipated profits) incurred between September 16, 1940, and August 14, 1945, without fault or negligence on their part in the performance of such contracts or subcontracts. * * *

* * * * *

SECTION 3. Claims for losses shall not be considered unless filed with the department or agency concerned within six months after the date of approval of this Act, and shall be limited to losses with respect to which a written request for relief was filed with such department or agency on or before August 14, 1945, * * *.

* * * * *

SECTION 6. Whenever any claimant under this Act is dissatisfied with the action of a department or agency of the Government in either granting or denying his claim, such claimant shall have the right within six months to file a petition with the Court of Claims * * * asking a determination by the court of the equities involved in such claim; and upon the filing of such a petition, the court, sitting as a court of equity, shall have jurisdiction to determine the amount, if any, to which such claimant and petitioner may be equitably entitled * * *.

STATEMENT

This action was brought under the Lucas Act, *supra*, pp. 2–3, to recover $91,086.36, the amount of loss incurred by petitioner in the performance of two wartime Government contracts for the manufacture of

knee length, khaki cotton trousers.[1] The Court of Claims found that the losses were, at least in substantial part, due to the fault of petitioner and that therefore it was not entitled, under the Act, to the relief sought (R. 52). The relevant facts may be summarized as follows:

Petitioner manufactures men's trousers, pants, and shorts in Buffalo, New York (R. 39). On December 31, 1942, and thereafter on January 20, 1943, petitioner entered into two separate contracts with the War Department for the manufacture of a total of 350,000 pairs of cotton khaki, knee length trousers at the price of $0.80 per pair (R. 40–42). By the terms of the contracts, cloth was to be furnished by the Government, and the other materials by the contractor (R. 41–42). Deliveries were governed by specific schedules established under each contract (R. 41–42).

These contracts were among twenty-nine such contracts placed by the Government, at comparable prices, to meet lend lease obligations (R. 42). Five of these contracts were placed in the Buffalo area. Both petitioner and the Government contracting officer knew that Buffalo was at that time an area where a severe labor shortage existed (R. 42).

As of December 31, 1942, petitioner had only thirty to thirty-five employees and forty single needle ma-

[1] During the period from September 16, 1940 to August 14, 1945, petitioner had entered into seven contracts with the Government (R. 40). Its total loss on all seven contracts, five of which were satisfactorily performed prior to December 1942, was $94,395.48 (R. 40). The present action sought recovery for losses—stipulated to be $91,086.36—incurred under two contracts (R. 40).

chines (R. 40). Its maximum production at that time were about 700 pairs of trousers per day, whereas the contracts necessitated maintenance of a production rate of about 4,000 pairs of trousers per day (R. 40, 44). Shortly after the execution of the contracts, petitioner hired two additional foremen with long experience in the manufacture of pants (R. 43). They, together with another foreman who had been employed by petitioner for a number of years and an experienced production man employed as plant superintendent (R. 43), constituted petitioner's supervisors of factory labor (R. 43). A number of operators with little or no experience in the needle trades were hired (R. 45). Because of other, higher paying, war industries in the Buffalo area, there was a substantial turnover in sewing personnel (R. 45).

Petitioner had bid on the first contract with the understanding that it would receive a preference rating to enable it to purchase certain items of machinery (R. 41). The necessary preference rating was issued (R. 42). However, petitioner was unable to secure enough equipment to produce the trousers in sufficient numbers to maintain contract schedules (R. 43–44).

Soon after petitioner began operations on these contracts, certain difficulties in production became evident (R. 45). Deliveries fell greatly behind schedule and there was an extremely high rejection rate, due mainly to deficiencies in sewing operations and failure to follow contract specifications (R. 45–46). On March 17, 1943, a representative of the Philadelphia Quartermaster Depot made an investigation to

ascertain petitioner's plant difficulties (R. 45). He was told by petitioner's officers of their difficulties in securing trained workers and machinery (R. 45). He also observed that the work in the cutting room had advanced far ahead of the other factory operations and that there was a great excess in cut garments over the amount that could be then utilized for sewing (R. 45). Overcutting is not a good practice in a clothing factory, since the overcut cloth takes up space and has a tendency to unravel and become dirty (R. 45).

Because of the continuing delinquency in deliveries, another Government representative investigated the conditions at petitioner's factory on May 14, 1943 (R. 46). He observed that the plant was greatly overcut and that of the two-day-shift and two-night-shift lines only one was operating satisfactorily (R. 46). The inefficiency of the operators he found to be due largely to lack of adequate supervision (R. 46). Overcutting had resulted in bundles of cloth, covered with a thick coating of dust, being piled under every cutting table and in every available spot where they might be placed (R. 46).

During this period of time, petitioner had salesmen on the road engaged in taking orders for civilian business (R. 49). Petitioner removed from 25 to 50 percent of its labor from work on the two Government contracts to begin civilian production (R. 49). Accordingly, labor which had been trained in sewing under Government contracts was diverted to fulfill petitioner's civilian business orders, although,

at the time, petitioner was far behind schedule on the Government contracts (R. 49).

On May 13, 1943, after 68,200 pairs had been shipped under the Government contracts, petitioner requested an increase in the contract price from $0.80 to $1.01 per pair, on the grounds that it had miscalculated both the wage rate and production difficulties (R. 12–14). The letter represented that petitioner then had 500 good machines already set up and in proper condition and 500 experienced operators ready to complete performance (R. 14). Subsequently, on June 8, 1943, petitioner telegraphed the Philadelphia Quartermaster Depot (R. 14–15):

> Re Contracts 24956 and 25778 losses to date in excess of $50,000 due to unexpected high labor costs and unforeseen manufacturing difficulties. Have computed present cost of $1.01 per pair including overhead but not including profit to prevent further loss and enable us to continue to manufacture. We request change in price to $1.06 per pair or cost plus basis. Have 203 machines available and 250 trained operators. Can produce and ship approximately 7,500 pairs per week probably more. Will furnish any further information desired.

Petitioner relied upon the communications of May 13, 1943 and June 8, 1943 as its written requests for relief as required by § 3 of the Lucas Act, *supra*, p. 3, (R. 49).

On June 24, 1943, the contracting officer inquired of petitioner whether it would agree to a termination of its right to produce and deliver the uncut quantity of trousers under the contracts at no cost to petitioner

except loss of anticipated profits (R. 51). Petitioner agreed on June 29, 1943 (R. 51–52), and, accordingly, the contracts were terminated. Petitioner, at that time, had produced approximately 155,000 of the 350,000 pairs of trousers covered by the two contracts (R. 52).

On February 6, 1947, petitioner filed a claim for relief under the Lucas Act with the War Department (R. 52). The War Contract Hardship Claims Board denied this claim (R. 52). Thereafter, on May 18, 1949, within the statutory period, petitioner brought this action in the Court of Claims (R. 3–6), which also denied relief (R. 39).

The court found "from all the evidence in the record * * * that in sustaining the stipulated losses * * * plaintiff was not without fault and that these losses were at least in substantial part due to the fault of the plaintiff" (R. 52). Deficiencies in organization and management, declared the court, were largely responsible for petitioner's losses (Pet. App. 6a). In this connection, the court stressed the fact that petitioner diverted part of its productive capacity to civilian commitments (Pet. App. 6a). Some of the commitments, it pointed out, were incurred while petitioner was experiencing its difficulties with the military work, and some of the diverted labor had undoubtedly been trained on the military contracts (Pet. App. 6a).

The court also recognized that petitioner operated under difficult conditions in that it undertook to perform contracts requiring great expansion of production, machinery, and labor (Pet. App. 7a). While the

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court noted that perhaps in those circumstances anyone would fail (Pet. App. 7a), the court concluded that in view of petitioner's deficiencies in organization and management in meeting these problems, its failure was attributable largely to factors for which it had assumed responsibility (Pet. App. 7a).

ARGUMENT

The Court of Claims has found, upon careful consideration of an extensive record, that the contract losses for which recovery is now sought "were at least in substantial part due to the fault" of petitioner. Accordingly, the prerequisite for relief under the Lucas Act, *supra,* pp. 2–3—absence of fault or negligence on the contractor's part—had not been met.

Significantly, petitioner does not controvert the factors which impelled the lower court's critical finding that "deficiencies in organization and management were largely responsible for plaintiff's losses" (Pet. App. 6a). Nor does it contend that inefficient planning and operations are inappropriate grounds for denial of Lucas Act relief. Cf. *Milwaukee Engineering and Shipbuilding Co.* v. *United States,* 129 C. Cls. 167; *Reltool Service Co.* v. *United States,* 128 C. Cls. 14. Rather, it is petitioner's basic premise that the court below utilized erroneous standards in determining that fault or negligence underlay petitioner's losses. The Court of Claims, petitioner declares, applied "a legal concept of negligence which involves not the standard of the reasonable man but that of a perfect man—in other words, any mistake or error regardless of circumstances is negligence" (Pet. 6).

BLEED THRU

This contention is belied, of course, by the various instances of petitioner's conduct considered by the court, *e. g.*, heedless overcutting; inadequate supervision of the machine operators to enable compliance with contract specifications; and the fact that, while experiencing its production difficulties on the two Government contracts, petitioner actively solicited concurrent civilian business and diverted from 25 to 50 per cent of its labor force, trained under the Government contracts, to fulfill its civilian orders. Moreover, petitioner's contention is conclusively negated by the very language of the decision. Thus, the opinion states that "We do not think that a mere minor fault would preclude plaintiff's recovery" (Pet. App. 6a). The court goes on to add, however, that this was not such a case, since petitioner's losses were "largely attributable to its own poor organization" (Pet. App. 7a).

Petitioner seeks to read the decision below as being predicated on the court's speculation that "[p]erhaps anyone was bound to fail" in circumstances where delivery was undertaken pursuant to contracts requiring great expansion of production, machinery, and labor (Pet. App. 7a). Petitioner emphasizes this comment of the court in an attempt to make what is essentially a factual finding of negligence appear to be a question turning on the appropriateness of the legal standards applied. However, the court makes clear immediately after this comment that "in view of plaintiff's deficiencies in coping with the managerial problems which such an expansion raises, plaintiff's failure is attributable largely to factors for which plaintiff assumed responsibility" (Pet.

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App. 7a). Thus, while operations undeniably were hampered by a labor shortage in the area—a condition petitioner was aware of at the time it submitted its bids—it was petitioner's faulty utilization of the labor on hand that the court found basic to its losses.

It may well be argued that petitioner's blind undertaking of contracts far beyond its existing capacity has, in itself, elements of fault, and that the consequences of such haphazard action should not be visited on the Government. Cf. *United States* v. *Brooks-Callaway Co.*, 318 U. S. 120, 124.[2] Indeed, petitioner is fortunate that the Government was willing to terminate the contracts when less than half performed. In any event, petitioner's deficiencies in coping with the concomitant problems of the ensuing expansion—the basis of the Court of Claims' finding of fault—alone sustains denial of relief.[3]

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[2] At the time petitioner submitted its bid on the first contract to supply 250,000 pairs of trousers at $0.80 per pair, it made an alternative offer to supply 500,000 pairs at $0.85 per pair (R. 40–41). Fortunately for petitioner, the Court of Claims observed, the alternative offer was not accepted (Pet. App. 6a).

[3] Even if the losses incurred had not been the result of its own mismanagement, petitioner's claim is far in excess of the amount to which it would have been entitled under the Lucas Act. Thus, the telegram of June 8, 1943, relied upon by petitioner as the written request for relief required by the Lucas Act, sought an increase in the contract price from $0.80 to $1.06 per garment—an additional $0.26 per garment (R. 48–49). However, in the Court of Claims, petitioner sought $91,086.36 for the 155,000 garments delivered prior to termination of its contract obligations on July 10, 1943. This would amount to approximately $0.59 per garment. The Court of Claims has previously held, in interpreting Section 3 of the Act, *supra*, p. 3, that a contractor cannot recover an amount greater than that requested in the initial claim for relief. *A. J. Spicer* v. *United States*, 127 C. Cls. 428; *Louis Rosner* v. *United States*, 125 C. Cls. 614.

LEED THRU

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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